Supreme Court, U.S.
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No. 031481

In The
Supreme Court of the United States
October Term, 2003

ARTHUR GUTIERREZ, JR.,
Petitioner,

VS.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit
New Orleans, Louisiana

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

SHOULD THE ACCUSED BE ENTITLED TO A NEW TRIAL WHEN PROSECUTORS DISAVOW TO THE TRIAL COURT ANY KNOWLEDGE THAT THE SPECIAL AGENT OF THE F.B.I. IN CHARGE OF THE STING OPERATION WAS HIMSELF UNDER INVESTIGATION FOR LYING TO FEDERAL AGENTS TO COVER HIS CRIMINAL CONDUCT DURING THE INVESTIGATION OF PETITIONER; AND THE GOVERNMENT ATTORNEYS PREVENTED THE PETITIONER FROM DISCOVERING THE AGENT'S CRIMINAL CONDUCT BY 'SEALING' ALL RECORDS OF THE CASE AGAINST THE AGENT UNTIL AFTER THE ACCUSED'S TRIAL AND AFTER BRIEFS HAD BEEN SUBMITTED, THEREBY DEPRIVING THE ACCUSED THE USE OF THE OBVIOUS BRADY MATERIAL IN TRIAL AND ON APPEAL?

LIST OF PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

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Petition For A Writ of Certiorari

To The United States Court Of Appeals

For The Fifth Circuit

New Orleans, Louisiana

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Arthur Gutierrez, Jr., respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the judgment of that court in *United States of America vs. Arthur Gutierrez, Jr,* 343 F.3d 415 (5th Cir. 2003), to resolve a conflict among the circuits on an important matter, and because the United States District Court has so far departed from the accepted and usual course of judicial proceedings, and the United States Court of Appeals for the Fifth Circuit has sanctioned such departure, so as to call for an exercise of this Court's supervisory power. The basis for the jurisdiction in the U.S. Court of Appeals for the Fifth Circuit is Rules 3 and 4(b), Federal Rules of Appellate Procedure. Jurisdiction in the U.S. District Court was established by a charge for a violation of 21 USC 846, Attempt to Aid and Abet the Distribution and the Possession with Intent to Distribute 5 Kilograms of Cocaine. Gutierrez was convicted by a jury

on April 9, 2002, and judgment of conviction and sentence were entered on June 20, 2002. Notice of Appeal was timely filed on June 25, 2002.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit appears at Appendix 1 and is reported at 343 F.3d 415 (5th Cir. 2003). The opinion of the United States District Court for the Western District appears at Appendix17 and is unpublished.

JURISDICTION

The Fifth Circuit decided this case on August 14, 2003. A timely petition for rehearing was denied by the Fifth Circuit on October 1, 2003, and copy of the order denying rehearing appears at App.31. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent text for each citation below is set out in the Appendix beginning at App. 27.

18 U.S.C. §2

21 U.S.C. §841(a)(1); 21 U.S.C. §841(d)(1)

21 U.S.C. §846

STATEMENT OF THE CASE

Arthur Gutierrez, Jr. was arrested as a result of an F.B.I. "sting" operation targeting officers of the San Antonio Police Department. Gutierrez was charged by indictment with one count of conspiring to distribute and possess with intent to distribute five kilograms or more of cocaine, two counts of attempting to aid and abet the distribution and possession with intent to distribute five kilograms or more of cocaine, and with two counts of knowingly carrying a firearm during and in relation to a drug trafficking crime. The case proceeded to trial, and a mistrial was declared due to jury deadlock. A retrial resulted in a jury acquitting Gutierrez of all counts except for one count of aiding and abetting distribution and possession with intent to distribute. The

district court sentenced Gutierrez to 180 months' imprisonment and five years' supervised release.

JONES AND RODRIGUEZ WERE IN CHARGE

Tonie Jones and Manny Rodriguez directed the sting operation of Gutierrez as F.B.I. co-special agents in charge. During the course of trial preparation Gutierrez received uncorroborated information that special agent Jones was being investigated by the agency for lying during the course of the sting operation; and that special agent Rodriguez was being investigated for theft of government money by submitting fraudulent reimbursement vouchers relating to hotel expenditures.

The government was well aware of the fact that special agent Jones's lying to federal agents continued throughout his involvement as special agent in charge of Gutierrez case. After Gutierrez's two trials and appellate oral argument, the government unsealed criminal proceedings against special agent Jones, revealing for the first time that Gutierrez's repeated requests for the exculpatory evidence were merited, and that the *Brady* material had been deliberately concealed.

Special agent Jones' plea proved that the government was well aware of his lack of moral turpitude and illicit behavior and most important, the government did not disclose that fact to the defense, but instead disavowed knowledge of same. Gutierrez was deprived of *Brady* material essential to his defense consisting of the facts surrounding the termination and conviction of the special agent in charge of the investigation of Gutierrez for lying to federal investigators.

Gutierrez has further learned that co-special agent in charge, Rodriguez, has been either terminated or suspended from the F.B.I. and Gutierrez believes it is due to the results of the above referenced investigation.

The government did not disclose either the investigations, conviction, or the underlying facts giving rise to same, to the defense, but instead **sealed all documents** pertaining to the prosecution of special agent Jones in order to prevent Gutierrez from discovering it.

Gutierrez filed a "Motion For an Evidentiary Hearing to Determine The Extent of Exculpatory Evidence No. Two", on February 26, 2002, indicating that Gutierrez's pretrial investigation led him to believe that special agent Tonie Jones and special agent Manny Rodriguez were under investigation

for possible criminal activity occurring in conjunction with the sting operation. Gutierrez's motion requested all *Brady* and *Giglio* material, and cited *Kyles v. Whitley*, reminding the prosecutors of their duty to investigate whether the government had possession or constructive knowledge of evidence corroborating what Gutierrez suspected.

No *Brady* material was turned over, and no attempt to tender *Giglio* material was ever made in response to Gutierrez's request.

Even though these 'category one' *Brady* violations need not be "preserved" for appellate review, immediately upon the unsealing of special agent Jones criminal case, Gutierrez requested an abatement, continuance, and evidentiary hearing in order to brief the issue, due to the recent discovery that the information had been deliberately secreted by the government. The Appellate Court denied the request.

Because of the government's response to Gutierrez's suspicions during the course of his trial preparation, Gutierrez was misled into believing that his source of information was incorrect. But in reality the government was deliberately withholding the exculpatory evidence from the defense.

Gutierrez discovered through the eventually unsealed plea agreement of FBI special agent Tonie Jones, and the factual summary attached thereto, that special agent Jones was a liar, and that he had been terminated from employment with the FBI for lying; and the government had that information when they responded to his Motion for Exculpatory Evidence.

But Gutierrez had no knowledge that the special agent in charge of the case had been terminated from employment with the FBI at the time his case was tried. Further, the government was well aware that special agent Tonie Jones had lied repeatedly to federal agents during the time that he was a special agent in charge of Gutierrez's case.

The pertinent dates are as follows:

------ January 1996 until May 2001- Tonie Jones was a special agent with the San Antonio Field Office of the FBI,

------November 1, 1999, it is alleged that Arthur Gutierrez was involved in the conspiracy with the co-defendants that existed up until June 27, 2001.

-----April 6, 2001, special agent Tonie Jones lied to the FBI Office of Professional Responsibility,

-----April 25, 2001, special agent in Charge Tonie Jones, again lied to FBI-OPR,

-----August 29, 2001, Jones again lied to the Department of Justice Office Of the Inspector General by sworn affidavit.

------January 31, 2002, special agent Jones lied to the United States Food and Drug Administration O.C.I.

------ April 2002, Art Gutierrez' trial and conviction.

------ April 2003, Jones enters a plea of guilty to 18 USC section 1001 (false statements).

Not only did the government decline to give the exculpatory/*Brady* material to Gutierrez for trial preparation and use at trial, they deliberately worded an order to effectively preclude Gutierrez from discovering that the special agent in charge of the case was involved in surreptitiously taping his supervisors and that he had been determined by the government to be a liar.

Even after the indictment was returned in this case against Gutierrez, special agent Jones was still being investigated and was continuously lying to the federal agents investigating him as late as August 2001.

The circumstances are exacerbated by the fact that this activity paralleled the defense Gutierrez raised during the course of the trial. Once he learned that the San Antonio police sergeant with whom he worked was protecting drug deals, he testified that his inherent distrust of the sergeant evoked a confluence of emotions and that he could not decide whom he could trust and to whom he could turn to reveal what he believed was ongoing criminal activity on the police force.

In the parallel situation, the FBI agents in charge of the investigation did not trust their supervisors and felt the need to surreptitiously tape record meetings in which the sting operation was organized.

GOVERNMENT PLEADS THAT GUTIERREZ AND JONES CASES ARE INEXTRICABLY INTERTWINED

On March 12, 2003, approximately one month before the Gutierrez oral argument in the Fifth Circuit, the U.S. attorney filed a document stating that the investigation and prosecution of co-special agent in charge, Jones, was directly related to Gutierrez's case, and arose out of the same transaction. The document indicated that the case against special agent Tonie Jones needed to be filed out of order and

be heard by Judge Prado, because it was related to the Gutierrez case which was currently in Judge Prado's Court. Importantly, the Government listed the case of *United States vs. Conrad Fragoza, et al.* (Arthur Gutierrez) SA-01-CR-167-EP as the related case to that of special agent Tonie Jones criminal case.

"Plan A amended" for the random assignment of cases was filed in April of 1983. Roman numeral 10 of that document instructs Counsel to indicate at the time of the filing of a criminal case whether or not it is related to any previously filed case. Paragraph 11, in pertinent part, states, " A criminal case is deemed related to an earlier pending criminal case when the indictment or information in the later case...2. **involves the same transaction or occurrence** which gave rise to a pending case, even though some of the defendant's names may differ in the cases.". As a result of the government's admission, Gutierrez's pretrial request for information that he specifically delineated to have occurred in the criminal investigation of special agent Tonie Jones was *Brady/Giglio* material and was therefore admittedly germane to his case.

On August 14, 2003, the Fifth Circuit Court of Appeals affirmed Gutierrez's conviction.

REASONS FOR GRANTING THE WRIT

Gutierrez requested to abate his appeal to the Fifth Circuit because he discovered that the F.B.I. special agent in charge of the investigation, who resulted in the charges against him, had pled guilty to lying to federal agents, during the course of this sting investigation of Gutierrez. That fact, which had been secreted during the course of Gutierrez's trial and appeal, came to light after briefs had been filed and oral argument set, aggrandized the request for information Gutierrez had received that the co-special agent in charge was under investigation for stealing, and/or misappropriating expense funds during the sting operation. Gutierrez requested that the Court continue this case in order for Gutierrez to present evidence and fully brief what Gutierrez perceived to be the most egregious *Brady* violation imaginable.

Gutierrez had previously heard unsubstantiated rumors prior to trial that led him to believe and concomitantly request the information in a "Motion for an Evidentiary Hearing to Determine the Extent of Exculpatory Evidence No. Two". In that motion Gutierrez requested that he be allowed

an opportunity to present evidence that the agents were currently being investigated for criminal activity committed during, and in relation to their duties, in the sting operation. The prosecutors disavowed any knowledge of the ongoing investigation of their two special F.B.I. agents in charge of the investigation and based upon their responses the Court presumably believed that Gutierrez was on a fishing expedition, and summarily denied Gutierrez's request. Once agent Tonie Jones entered his guilty plea in open court (in the same District Courtroom in which Gutierrez was tried), it was apparent to Gutierrez that the investigation into the agent's criminal activity had been ongoing during Gutierrez's trial, just as Gutierrez had informed the Court in the aforementioned motion. Gutierrez did not have sufficient, nor reliable, information to present to the jury, make it relevant, or in light of the prosecutor's disavowal, to even have the confidence to ask the questions to try to ferret out the information during the trial. Because the government did not reveal the obvious *Brady* material before trial, and even went so far as to disavow knowledge of same, Gutierrez was even lulled into the belief that the information he had received must have been unreliable.

Special agent Manny Rodriguez and special agent Tonie Jones were surreptitiously taping meetings in regard to the procedures utilized to set up and run the sting operation on Gutierrez. Although the government informed Gutierrez of the existence of the tapes, he was never apprized of the criminal conduct of the agents or the ensuing investigation.

On April 11, 2003, this case was set for oral arguments at 9:00 a.m. The Plea Agreement and Factual Basis for the Plea in the *United States v. Tonie Jones* were filed on April 9, 2003, too late to be utilized by Gutierrez in his brief or oral argument. Gutierrez **ONLY** discovered the charge, plea, and conviction of the agent through a newspaper reporter who happened to walk into Court and witness the proceeding that was the end result of a series of "sealed" documents. In the interest of justice, Gutierrez asked for time and an opportunity to prepare a supplement to the appellant's brief in this cause dealing with the following issues:

1) FBI agent Tonie Jones was a special agent in charge, or a co-special agent in charge, of the very investigation which resulted in the arrest and trial of Gutierrez.

2) His plea was to the offense of making false statements during the investigation concerning illegal conduct and improprieties during meetings that were called for the purpose of setting up the sting operation which enticed Gutierrez and to which he asserts he was entrapped. Agent Jones agreed that statements he made were materially false, fictitious and fraudulent during the course of that investigation. Jones pled to the fact that he knew the statements were false at the time that he made them.

3) Gutierrez's counsel did not receive proof that Special Agent Jones was being investigated, nor that he had entered a plea, until he read about it in the paper and talked to the reporter who wrote the story.

After returning from oral argument in New Orleans and having the opportunity to review the plea paperwork, it became readily apparent that the investigation of agent Tonie Jones and his ensuing plea of guilty were material, substantial, germane, and relevant to the Gutierrez case.

Government attorneys have indicated that the fact that special agent Tonie Jones had pled guilty to lying to agents about activities during the course of the sting operations of Gutierrez was inconsequential. Approximately one month

before oral argument, the U.S. Attorney's Office had filed with Judge Prado's court a sealed document indicating that the case against special agent Tonie Jones needed to be heard in Judge Prado's docket because it was **related to another case** currently in Judge Prado's court and cited the case of the *United States vs. Conrad Fragoza, et al. (Arthur Gutierrez)* SA-01-CR-167-EP. The position taken by the government to get the case against special agent Jones filed in Judge Prado's court along with the *United States v. Arthur Gutierrez*, is diametric to the position that Jones plea is inconsequential. The materiality and the relation are obvious in the document filed on March 12, 2003, in which they utilized the materiality of the criminal case against Jones to get it filed out of procedural order and into the same Court as Gutierrez by a special related case provision.

***BRADY/GIGLIO* VIOLATION**

Gutierrez asked the appellate court to continue the proceedings and allow him to brief what he considers a *Brady/Giglio*, and *Kyles v. Whitley* violation. Prior to the jury trial Gutierrez had filed a motion requesting that information. However, Gutierrez admitted that he did not have any direct

proof of same at that time. Accordingly, Gutierrez filed a motion requesting any *Brady* material, or *Giglio* material, and even cited *Kyles v. Whitley*, informing the prosecution that it had a duty to go out and investigate to find out whether, within the knowledge of the government, there was an ongoing investigation of the agents. It is important for this court to know that defense counsel worked diligently and assiduously in order to acquire this information which was obvious *Brady* information and at the very least, alternatively, would have been *Giglio* information and would have changed the trial strategy for Gutierrez's counsel. Gutierrez could have very easily called special agents Tonie Jones and Manny Rodriguez to the witness stand and impeached them with these material events. The first jury hung, and a mistrial was declared. The second jury deliberated over the course of more than two days and acquitted Gutierrez on four of the five counts. Gutierrez believes the jury would have acquitted him on the other count had the jury been aware of Jones' misconduct; and at the very least, the refusal to acknowledge the ongoing criminal conduct and the ensuing investigation undermined the fairness of the trial. An acquittal more than likely would have been the result.

However, even after Gutierrez notified the prosecution that it believed this investigation was taking place, no *Brady* material and no attempt to acquire *Giglio* material was ever made. Gutierrez surmises that there was never any attempt under *Kyles v. Whitley* to discover this information and Gutierrez's request was just ignored. But after the trial and immediately before oral argument Gutierrez discovered that the allegation in Gutierrez's attached motion, requesting the information, almost mirrored the factual basis of the plea of guilty of special agent Tonie Jones. Based on the dates in the factual basis in the plea agreement, it is obvious that the information was known to the government at the time of the motion requesting the *Brady/Giglio* material.

The factual basis of special agent Jones' Plea of Guilty, filed April 9, 2003, stipulates that special agent Tonie Jones, was with the department in San Antonio from January 1996 until May 2001. Jones was in charge of the sting operation of Gutierrez and others. The period of the government investigation of the two special agents in charge, i.e. Tonie Jones and Manny Rodriguez, coincides with the period that Jones and Rodriguez were in charge of the sting operation regarding Gutierrez. During the periods referred to

hereafter, the government was under a general obligation to provide exculpatory evidence and *Giglio* material as per the Court's general order of discovery and their obligation under *Brady, Giglio*, and *Kyles v. Whitley.* Attached hereto is the Order denying the Defendant's Motion For an Evidentiary Hearing to Determine The Extent of Exculpatory Evidence No. Two filed Feb. 26, 2002, which requested specifically the information that appears in the factual basis for the plea; as follows:

1. April 6, 2001, special agent Jones was compelled to submit to an interview as a potential witness to an investigation. Special agent Jones signed a sworn five page statements, in which he lied about his activities during the meetings in which the procedure for this sting operation and the scenarios were set up. The statement was "materially false, fictitious, and fraudulent....."
2. On April 25, 2001, special agent Jones submitted to a second interview and lied.

3. On August 29, 2001, special agent Jones again submitted to an interview and again lied, giving materially false, fictitious facts.

4. January 31, 2002, special agent Jones lied to the Food and Drug Administration concerning that he had been the subject of an investigation.

That factual basis shows us that at the very least from April 6, 2001 through January 31, 2002, the government was aware that special agent Jones was being investigated and was lying repeatedly to federal agents and therefore repeatedly committing federal offenses. On February 26 of 2002, Gutierrez filed a Motion for Evidentiary Hearing to determine the extent of exculpatory evidence # Two, in which he informed the government of its responsibility under *Kyles v. Whitley* to review the conduct of the agents who worked on the investigation. He diligently attempted to discover the existence of any exculpatory evidence or the potential thereof. Gutierrez's Motion states, in pertinent part in Paragraph IV as follows:

Art Gutierrez pointed out in that Motion that a reliable source had informed him that special agent Manny Rodriguez had been the subject of an ongoing investigation concerning whether or not he and the cooperating individual had misappropriated expense funds during the course of the investigation.

Gutierrez informed the court that with regard to special agent Jones, the defense had received information from a reliable source, that special agent Jones was the subject of another investigation that was ongoing. He informed the government that Gutierrez had received information that special agent Jones had denied the existence of the tapes and/or had denied his knowledge of participation in the surreptitious taping. Gutierrez went on further to inform the court that he believed that the investigators had discovered that special agent Jones was lying to the investigators during the course of their investigation into the surreptitious taping.

Gutierrez believed that it defied the bounds of the imagination, that the prosecutors would not be aware of the investigations, if Gutierrez could receive information that they

were ongoing. Gutierrez believed that the government was turning a blind eye to this *Brady* and *Giglio* material, and the government continued to stonewall him.

Gutierrez believed that the plea entered into by special agent Tonie Jones should have been cause for the Appellate Court to consider an abatement for an evidentiary hearing to determine whether the information obtained by Gutierrez that co-special agent in charge Manny Rodriguez was being investigated by the government and being accused of misappropriation of government funds, alleged to have occurred during the course of this very investigation, should be revisited. Although the government refused to acknowledge that an investigation of that nature had been conducted, was ongoing, or had been completed, the government apparently stonewalled the defense on the Jones investigation, and the stonewalling was eventually revealed only because the defense proved the information regarding the investigation to be true and correct.

The constitutional question concerns a federal criminal defendant's waiver of the right to receive from prosecutors exculpatory impeachment material -- a right that the Constitution provides as part of its basic "fair trial"

guarantee. See U.S. CONST. Amendments 5 and 6. *See also*, *Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963).

> (Due process requires prosecutors to "avoid . . . an unfair trial" by making available "upon request" evidence "favorable to an accused . . . where the evidence is material either to guilt or to punishment"); *United States v. Agurs*, 427 U.S. 97, 112-113, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976).

Kyles v. Whitley, 514 U.S. 419, 435, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995) indicates that exculpatory evidence is evidence the suppression of which would "undermine confidence in the verdict". *See also*, *Giglio v. United States*, 405 U.S. 150, 154, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972).

CONCLUSION & PRAYER

The judgment against ARTHUR GUTIERREZ, JR. should be reversed and remanded because of the deliberate and knowing violation of the exculpatory evidence doctrine espoused in *Brady* and *Giglio*. Therefore, Arthur Gutierrez respectfully prays that this writ be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-50668

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ARTHUR GUTIERREZ, JR.,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

[Opinion filed: August 14, 2003;
Judgment entered: March 8, 2001
Judgment filed in U.S. District Court: March 12, 2001]

Before GARWOOD and HIGGINBOTHAM, Circuit Judges, and FELDMAN, District Judge.*

PATRICK E. HIGGINBOTHAM, Circuit Judge:

After a reverse-sting operation devised by the FBI to target various members of the San Antonio Police Department willing to commit crimes for money, a grand jury indicted

* District Judge of the Eastern District of Louisiana, sitting by designation.

Arthur Gutierrez, Jr., a fifteen-year veteran of the police force, for various drug offenses. The indictment charged Gutierrez with one count of conspiring to distribute and possess with intent to distribute five kilograms or more of cocaine, two counts of attempting to aid and abet the distribution and possession with intent to distribute of five kilograms or more of cocaine, and with two counts of knowingly carrying a firearm during and in relation to a drug trafficking crime. The case against Gutierrez proceeded to trial, but during deliberations the jury deadlocked and the district court declared a mistrial. Upon retrial a jury acquitted Gutierrez of all counts except for one count of aiding and abetting distribution and possession with intent to distribute. The district court sentenced Gutierrez to 180 months' imprisonment and five years' supervised release. Gutierrez now appeals his conviction, and we affirm.

I

The evidence showed that after receiving information that officers of the San Antonio Police Department would commit crimes in exchange for money, the FBI commenced a reverse-sting operation centered around Ricardo Pagan, an undercover agent posing as a

mid- level drug dealer. Pagan offered San Antonio police officers opportunities to provide security for various drug transactions Pagan would orchestrate. Pagan's practice was that, prior to the jobs, he would meet with an officer and tell him in no uncertain terms the specific nature of the transaction and the amount of cocaine involved. He also explained to the officers that he did not carry a gun and wanted them because they had "badges and guns," and could "run interference" with any of his competitors who might attempt to pose as cops and rip him off or with actual law enforcement officers who might stop his drug couriers during a drug run.

Pagan requested that the officers act as security in one of two transactions. The first type, the "escort scenario," involved a load vehicle that transported fake cocaine to a specific destination. Pagan would arrange for two police officers, one in the lead car and the other in the trail car, to escort the load vehicle to the point of arrival, usually a place outside of San Antonio. The second type, the "protection transaction," was contained in Pagan's hotel room. Pagan would call his courier - another undercover agent - to bring the fake cocaine to the room. In the presence of the participating officers, Pagan would unpack it, display it, and then repack it. The courier would leave and Pagan would hide the cocaine in another room, make a call to the "buyer," and have the buyer's courier come to the hotel room to pick up the drugs. Pagan again involved two officers, requesting that one stay in the room to provide security while the other wait in the parking lot of the hotel to notify Pagan when the buyer's courier arrived and to confirm whether that courier was alone or being followed. FBI agents situated in an adjoining hotel room recorded on

video and audio every transaction and meeting Pagan held in his hotel room.

The first mention of Gutierrez to Pagan came on July 21, 2000, after Pagan had already conducted several transactions using Conrad Fragozo, a sergeant on the police force, and other officers Fragozo had invited in.[1] Pagan

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[1] According to Pagan, Fragozo had no knowledge that Pagan was conducting a reverse-sting operation.

called Fragozo to ask if he knew of any other officers who might want to participate, and Fragozo responded that he had an academy buddy he had known for fifteen years, later identified by Fragozo as Gutierrez. Gutierrez testified that on August 21, 2000, Fragozo approached him about doing a job for a businessman from Chicago who wanted his stripper girlfriend trailed because he feared she was cheating on him. Gutierrez agreed to the job, and Fragozo set up a meeting for the next day so that Gutierrez could meet the businessman. Gutierrez explained that once he arrived at Pagan's hotel room, Pagan and Fragozo revealed the true nature of the job, which was to act as security for drug deals. Pagan stated that he needed twenty-five kilograms of cocaine transported and wanted Gutierrez to escort the shipment. Gutierrez responded, "No problem. Sounds easy enough."

Pagan and Gutierrez arranged to meet back at the hotel room at ten-thirty the next morning, August 23, for the escort. Even though Gutierrez had to work an all night patrol shift, he stated, "I am up for it." Fragozo pointed out that Gutierrez was scheduled to work security during the daytime for the Alamo Café, to which Gutierrez replied that that was not a problem and he could get someone else to

work that shift. Pagan testified that he attempted to give Gutierrez an opportunity not to participate by telling him, "If you ever decide, hey, I am done with this, just tell me, because I am not forcing anyone to do anything." However, Gutierrez chose to go forward with the transaction, stating, "Sounds good to me. Give me a call early on the arrangements, so I have time to get over here."

On August 23, Gutierrez met Fragozo and Pagan and assisted in the drug escort. Two undercover agents posing as drug couriers escorted the twenty-five kilograms of cocaine to a hotel in Schwertz, Texas, about a half an hour away. Carrying a firearm, Gutierrez drove the trail vehicle, and after he returned, Pagan paid him $2500. Pagan asked if the amount was fair. Gutierrez said it was. Pagan asked if Gutierrez would be willing to do it again and Gutierrez said he would.

About a month later, on September 20, 2000, Pagan had Fragozo contact Gutierrez about the possibility of assisting with a protection transaction. Gutierrez agreed, and met them on that date to plan. On the following day, Gutierrez arrived carrying his service weapon and was present when Pagan's courier dropped off fifteen kilograms of fake cocaine and Pagan unpacked and repacked it. Pagan then instructed Gutierrez to surveil the hotel parking lot and watch for the buyer's courier, which Gutierrez did after asking for a description of the vehicle the courier would be driving. Gutierrez alerted Fragozo, who was in the hotel room, to the courier's arrival. After the conclusion of the transaction Gutierrez again received $2500. Fragozo never contacted Gutierrez about any further transactions.

Gutierrez was indicted in March 2001. He raised three defenses at trial. First, he argued that his initial

participation in the conspiracy was motivated by fear for his life. Second, he asserted that he continued to participate in the scheme in order to obtain more information about the drug smuggling as part of his own investigation into Pagan and Fragozo's activities, an investigation that he maintained he did not report to his superiors for fear that they might also be involved in the illegal activity.[1] Gutierrez also

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[1] When Gutierrez was ultimately arrested-several months after he initially met Pagan-he still had yet to report his investigation either to any other officer in the police department or to any other agency.

Sought to raise the defense of entrapment.

The trial judge included a duress instruction but declined to instruct on entrapment. The jury acquitted Gutierrez of conspiracy and of the counts drawn from the August 23 transaction, which included one count of attempting to aid and abet and a count of carrying a firearm during a drug trafficking offense. It also acquitted him of the charge of carrying a firearm during the September 21 transaction. However, the jury convicted Gutierrez for attempting to aid and abet for his role in the September 21 transaction.

II

Gutierrez first asserts that the district court reversibly erred in refusing to give an entrapment instruction to the jury. During the first trial Gutierrez's attorney requested only an instruction on duress. His counsel requested an entrapment instruction in the second trial. The trial judge denied defendant's requests for "supplemental instructions" during the second trial on the

basis that they either were not supported by the evidence or because they were sufficiently covered in the proposed instructions.[1]

We review *de novo* a trial court's refusal to instruct the jury on the defense of entrapment.[2]

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[1]The instructions given did not mention entrapment. Therefore, we assume the district court refused to instruct the jury on entrapment because it did not believe sufficient evidence existed in the record to warrant the defense.

[2]*United States v. Ogle,* 328 F.3d 182, 185 (5th Cir. 2003).

We have recently reminded that "[w]here there is an evidentiary foundation for a theory of defense that, if credited by the jury, would be legally sufficient to render the accused innocent, it is reversible error to refuse a charge on that theory."[3] Therefore, "'when a defendant's properly requested entrapment instruction is undergirded by evidence sufficient to support a reasonable jury's finding of entrapment, the district court errs reversibly by not adequately charging the jury on the theory of entrapment.'"[4]

The core question regarding entrapment is whether the criminal intent originally resided in the defendant; in other words, whether the government planted the seed of criminality, or instead whether the defendant was willing to perpetrate the offense and the government simply provided the opportunity.[5] "Entrapment only arises...where the Government, in its 'zeal to enforce the law, 'implant[s] in an innocent person's mind the disposition to commit a criminal act, and then induce[s] commission of the crime so that the Government may prosecute.'"[6] Therefore, to be

entitled to an entrapment instruction, a defendant bears the burden of presenting evidence of "'(1) his lack of predisposition to commit the offense and (2) some governmental involvement and inducement more substantial than simply providing an opportunity or facilities to commit the offense.'"[7]

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[3] *Id.* (internal quotation marks omitted).

[4] *Id.* (quoting *United States v. Bradfield,* 113 F.3d 515, 521 (5th Cir. 1997)).

[5] *Id.*

[6] *Id.* (quoting *Jacobson v. United States,* 503 U.S. 540, 548 (1992)).

[7] *Id.* (quoting *Bradfield,* 113 F.3d at 521).

Gutierrez's claim for an entrapment instruction founders on the government inducement prong of the entrapment defense. He argues that government inducement was evident in two ways: First, in the nature of the sting operation itself, and second, in the conduct of Fragozo, the individual who recruited him into the scheme. However, neither presents sufficient evidence of government inducement to require a jury instruction.

Gutierrez points to three characteristics of the sting operation that he maintains evidence governmental inducement of criminal activity. First, Gutierrez argues that the operation was improper since it resulted in the indictment of persons who were not its original targets. Second, he argues that the sting operation was improperly broad in scope. Finally, Gutierrez maintains that inducement is evident in the fact that the individual targets of the investigation were intentionally kept unaware of the activities of the other targets of the investigation.

Gutierrez's arguments take the entrapment defense beyond its limits. Government involvement in the offense is not the equivalent of government inducement. "Government inducement consists of the creative activity of law enforcement officials in spurring an individual to crime."[8] None of the characteristics of the sting operation identified by Gutierrez establish improper government inducement, or indicate that the Government went beyond the bounds of proper law-enforcement activity. Simply because the chain of events leading to the defendant's arrest originated with the government does not entitle a defendant to an entrapment instruction. "It is proper (i.e., not an 'inducement') for the government to use a 'sting,' at least where it amounts to providing a defendant with an 'opportunity' to commit a crime."[9]

That the operation resulted in the indictment of persons not originally targets of the investigation does not establish improper government conduct. Similarly, that the investigation was broad-ranging, or that the targets of the investigation were unaware of the roles played by other members of the conspiracy, is irrelevant. And Gutierrez cites no authority to support his claim that the Government improperly induces crime by casting a wide net.

Gutierrez relies on *United States v. Gendron,*[10] but it in fact undermines any argument that the sting operation against Gutierrez was improper. *Gendron* set forth seven examples of government activity that might be considered improper, none of which embrace the sting operation at issue here.[11] All of the examples listed in *Gendron* involved

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[9] *United States v. Gendron*, 18 F.3d 955, 961 (1st Cir. 1994) *see also Jacobson v. United States,* 503 U.S.

540, 548 (1992) (noting that law enforcement officers may employ "'artifice-and stratagem . . . to catch those engaged in criminal enterprises'" (quoting *Sorrells v. United States,* 287 U.S. 435, 441 (1932)))

[10] 18 F.3d 955.

[11] *Id.* at 961-62 ("Courts have found a basis for sending the entrapment issue to the jury (or finding entrapment established as a matter of law) where government officials: (1) used 'intimidation' and 'threats' against a defendant's family, *United States v. Becerra,* 992 F.2d 960, 963 (9th Cir. 1993) ; (2) called every day, 'began threatening' the defendant, and were belligerent, *United States v. Groll,* 992 F.2d 755, 759 (7th Cir. 1993) ; (3)

either threatening or harassing conduct or actions designed specifically to take advantage of the defendant's weaknesses, and all involve conduct more egregious than the initiation of a broad sting operation.

Gutierrez also points to a statement from *United States v. Anderton* that entrapment may arise "even though the person implanting the illegal purpose is an ignorant pawn of the government,"[12] arguing that Fragozo's conduct should be attributed to the Government and thereby suffices to establish the requisite government inducement. Even if Fragozo's actions could be attributed to the Government, however, those actions do not amount to government inducement. Gutierrez's sole support for the position that

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engaged in 'forceful' solicitation and 'dogged insistence until [defendant] capitulated,' *[United States v. Rodriguez,* 858 F.2d 809, 815 (1st Cir. 1988)]; (4) played upon

defendant's sympathy for informant's common narcotics experience and withdrawal symptoms, *[Sherman v. United States,* 356 U.S. 369, 373 (1958)]; (5) played upon sentiment of 'one former war buddy ... for another' to get liquor (during prohibition), *[Sorrells v. United States,* 287 U.S. 435, 440-411 *;* (6) used 'repeated suggestions' which succeeded only when defendant had lost his job and needed money for his family's food and rent, *United States v. Kessee,* 992 F.2d 1001, 1003 (9th Cir. 1993) ; (7) told defendant that she (the agent) was suicidal and in desperate need of money, *United States v. Sullivan,* 919 F.2d 1403, 1419 & n. 21 (10th Cir. 1990) .").

[12] 629 F.2d 1044, 1047 (5th Cir. 1980).

Fragozo improperly induced Gutierrez's participation is Gutierrez's claim that he was frightened of Fragozo because Fragozo, his superior on the police force, had access to the police computer and knew where Gutierrez lived. Yet Gutierrez's asserted fear is unsupported by any suggestion that Fragozo ever threatened him, harassed him, or manipulated his personal weaknesses to convince Gutierrez to join the conspiracy. Nor does Gutierrez point to any evidence of his hesitation to join the scheme or that such hesitation was overcome only by Fragozo's inducements.

The burden of establishing government inducement is on Gutierrez, and absent more, the mere claim that he was personally frightened of Fragozo is insufficient to establish "a reasonable doubt on the ultimate issue of whether criminal intent originated with the government."[13]

Because Gutierrez did not satisfy his burden of presenting evidence of government inducement, the district court did

not err in denying an instruction on the defense of entrapment.

III

Gutierrez also contends that the district court erred in denying his motions to dismiss for outrageous government misconduct without holding an evidentiary hearing. The denial of a motion to dismiss an indictment for outrageous government misconduct is reviewed *de novo*,'[14] while a district court's decision not to hold an evidentiary hearing before denying a motion to dismiss an

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[13] *Bradfield,* 113 F.3d at 521.

[14] *United States v. Asibor,* 109 F.3d 1023, 1039 (5th Cir. 1997).

indictment is reviewed for an abuse of discretion.[15]

"Government misconduct does not mandate dismissal of an indictment unless it is so outrageous that it violates the principle of fundamental fairness under the due process clause of the Fifth Amendment."[16] As such, dismissal of an indictment for outrageous government conduct is proper only in "the rarest circumstances."[17] Accordingly, a defendant claiming outrageous government conduct bears "an extremely high burden of proof," and must demonstrate, in light of the totality of the circumstances, both substantial government involvement in the offense and a passive role by the defendant.[18] The requirement that the defendant play only a passive role means that "[a] defendant who actively participates in the crime may not avail himself of the defense."[19]

Although on appeal Gutierrez correctly states the law in regard to this claim, he fails to cite any portion of the record in support of his charge of outrageous conduct or point to specific facts tending to establish one of those rare circumstances in which

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[15] *See United States v. Linetsky,* 533 F.2d 192, 203 (5th Cir. 1976).

[16] *United States v. Johnson,* 68 F.3d 899, 902 (5th Cir. 1995) (internal quotation marks omitted).

[17] *Id.*

[18] *Asibor,* 109 F.3d at 1039.

[19] *United States v. Evans,* 941 F.2d 267, 271 (5th Cir. 1991) (internal quotation marks omitted).

the government's conduct is so outrageous that it implicates principles of fundamental fairness. Instead, Gutierrez's entire argument on this issue on appeal consists of the conclusory statement that his case presents "a set of circumstances falling within the 'rarest and most outrageous.'"

We do not find error in the district court's refusing to conduct an independent hearing on the allegations of government misconduct. Gutierrez's allegations of misconduct, centering on surreptitiously recorded audio tapes of two FBI agents discussing the reverse-sting operation, bore virtually no relevance to the government's case against him. The government's case was grounded not on the testimony or credibility of the agents on the audio tapes - whom neither party called to testify at trial - but was

instead based on the video tapes of Gutierrez interacting with Pagan and Fragozo.[20]

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[20] Gutierrez asserts that, subsequent to his conviction, another FBI agent involved in the reverse-sting, Tonie Jones, pleaded guilty to making false statements in regard to the investigation. Gutierrez argues that Jones's actions during the investigation may constitute outrageous government conduct warranting dismissal of the indictment, and asks that we remand the case to the district court so that it may conduct a hearing on the issue. However, a review of the factual basis for Jones's plea makes clear that the allegations against Jones - who was not a witness in Gutierrez's trial - relate only to his untruthful statements that he and another agent did not assist in taping a conversation with FBI management in June 1998, not to anything that would have related to the investigation into Gutierrez's activities in 2000. Therefore we decline to remand on that basis.

Moreover, the district court rightly concluded that Gutierrez "asserted nothing that would imply that [his] participation" in the enterprise "was passive," thereby removing the outrageous government misconduct claim from his reach. In its response to Gutierrez's first misconduct motion, the government explained that he, along with other defendants, had "made their presence known as the hired muscle for someone they suspected to be a narcotics trafficker in what they believed to be his illegal dealings in order to provide intimidation and further protect the suspected dealer," made "phone calls to each other to report movements of suspected drug traffickers [and] surveill[ed] people believed by them to be drug traffickers,"

and "protect[ed] what they believed to be drugs, drug proceeds and drug traffickers, including escorting (driving their personal vehicles) load vehicles in order to insure their safe arrival at [the] delivery location[] ."

Gutierrez did not refute these allegations, which the government supported with evidence at trial. The testimony showed that during the September 21 transaction Gutierrez agreed to provide security for a drug deal, asked Pagan for a description of the buyer's courier's vehicle so he would be able to spot it upon its arrival into the parking lot, programmed Fragozo's cell phone number into his own cell phone so that he would be able to contact Fragozo as soon as the courier arrived, and waited in the parking lot to notify Fragozo upon the courier's arrival. The district court did not err in concluding that Gutierrez could not prevail on his outrageous government conduct argument since he provided more than "meager assistance" during the operation of the enterprise.[21]

[21] *See United States v. Tobias,* 662 F.2d 381, 386 (5th Cir. Unit B 1981).

IV

Gutierrez's last point of error has been fluid over the course of this appeal. In his brief Gutierrez argues that the district court abused its discretion in refusing to admit portions of audio tape recordings of certain FBI agents talking amongst themselves about the reverse-sting operation, although he failed to cite to the portion of the record in which the district court allegedly denied his request to admit the tapes at trial. At oral argument, Gutierrez did not contend that the district court erred in not admitting these recordings into evidence. Rather, the

argument was that it wrongly denied Gutierrez access to the redacted portions of the tapes.

The government's brief urges that it has not been able to locate any proffer by Gutierrez of any portion of the tapes, and at oral argument the prosecutor explained that he did not remember any request by the defendant for the district court to disclose to Gutierrez the redacted portions of the tapes. Despite prompting during oral argument, Gutierrez could not furnish the court with any citation to the record supporting either of his assertions. Our own review of the record has also failed to turn up anything of the sort.[22]

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[22] As for Gutierrez's claim that the trial court refused to admit the audio tapes into evidence, only two documents arguably bear on this issue. First, the government filed a motion in limine requesting that the court bar the defense from "releasing [to the jury venire or the jury] the existence and contents of these tapes ...until the relevancy of the tape recordings has been demonstrated by the Defense." The motion did not request a determination on the admissibility of the tapes, but rather simply asked that the court preclude the defense from mentioning the tapes before they

Because Gutierrez has shown neither that the district court refused to admit any of the tapes into evidence at trial nor that it refused his request to have access to the redacted portions of the tapes, these issues are not properly before us for review.

V

We AFFIRM Gutierrez's conviction for attempting to aid and abet distribution of and possession with intent to distribute five or more kilograms of cocaine. Gutierrez's

motions to supplement the record, to reverse his conviction and remand the case for a new trial, to remand for the purpose of ordering an evidentiary hearing, and to abate the appeal are DENIED. The Government's motion to seal all filings in this appeal is GRANTED pending further order by this court or the district court.

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demonstrated their admissibility.

Second, in his "Motion for a Protective Order to Prevent the FBI from 'Manipulating the Judicial System' and 'Screwing the System' and for an Evidentiary Hearing to Illicit Evidence of Outrageous Government Conduct," one of a bevy of near-identical motions filed prior to commencement of his first trial, Gutierrez requested, in addition to an evidentiary hearing, "the right to present [the audio tapes] in evidentiary form so that the jury can see that there were attempts to delete and/or alter documents, and even attempts to train the agents to prepare different sets of documents." The district court denied the "Motion for [a] Protective Order and for [a]n Evidentiary Hearing" but did not express any opinion on the admissibility of the tapes at trial. Gutierrez did not seek at trial to introduce the audio tapes.

APPENDIX B

UNITED STATES DISTRICT COURT
Western District of Texas
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA
Plaintiff,

v.

ARTHUR GUTIERREZ, JR.
Defendant.

Case Number SA-01-CR-167-(5)-EP
USAO Number 2001R01767

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, ARTHUR GUTIERREZ, JR., was represented by Jimmy B. Parks, Jr.

The defendant has been found not guilty on Count(s) One (1), Ten (10), Eleven (11) and Fifteen (15) of the Superseding Indictment and is discharged as to such Count(s) and on Motion of the Government, the Original Indictment is dismissed as to this defendant.

The defendant was found guilty on Count Fourteen (14) of the Superseding Indictment by a jury verdict on

April 9, 2002 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such Count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC 846, 841(a)(1) & 841(b)(1)(A) and 18 USC 2	Attempt to Aid and Abet the Distribution and the Possession with Intent to 5 Distribute Kilograms or more of Cocaine	On or about September 21, 2000	Fourteen (14)

As pronounced on June 20, 2002, the defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00. Payment of special assessment [sic] shall begin immediately. Said special assessment shall be made to the Clerk, U.S. District Court, 855 East Durango Blvd., San Antonio, TX 78206.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all

fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the Court and United States Attorney of any material change in the defendant's economic circumstances.

Signed this the 20th day of June, 2002.

/s/_____
EDWARD C. PRADO
United States District Judge

Defendant's SSN: 462-41-8912
Defendant's Date of Birth: 09/01/1962
Defendant's address: 7603 Briston Park; San Antonio, TX 78249

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 180 months.

The Court makes the following recommendations to the Bureau of Prisons:

That the defendant serve this sentence at Federal Correctional Institution as close to San Antonio, Texas as possible.

The defendant shall remain in custody pending service of sentence

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____

to _____ at _____,

with a certified copy of this Judgment.

_____

United States Marshal

By _____
Deputy Marshal

Defendant: ARTHUR GUTIERREZ, JR.
Case Number: SA-0l-CR-167-(5)-EP

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Five (5) years.

While on supervised release, the defendant shall comply with the standard conditions that have been adopted by this Court as set forth on page 4 of this judgment; and shall comply with the following additional conditions:

X The mandatory drug testing condition is suspended based on the Courts determination that the defendant poses a low risk of future substance abuse.

Defendant: ARTHUR GUTIERREZ, JR.
Case Number: SA-0l-CR-167-(5)-EP

CONDITIONS OF SUPERVISION

Mandatory Conditions:

1) The defendant shall not commit another federal, state, or local crime.

2) The defendant shall not illegally possess a controlled substance.

3) If the judgment imposed a fine or a restitution obligation it shall be a condition of supervision that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervision in accordance with any schedule of payments set forth in the Criminal Monetary Penalties sheet of the judgment. In any case, the defendant shall cooperate with the Probation Officer in meeting any financial obligations.

4) In supervised release cases only, the defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

5) If convicted of a felony, the defendant shall not posses [sic] a firearm, destructive device or any other dangerous weapon.

6) For offenses committed on or after September 13, 1994, the defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release

from imprisonment or placement on probation and at least two periodic drug tests thereafter, as directed by the Probation Officer.

The above drug testing condition may be suspended based on the Courts determination that the defendant poses a low risk of future substance abuse.

Standard Conditions:

1) The defendant shalt not leave the judicial district without the permission of the Court or Probation Officer.

2) The defendant shall report to the Probation Officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquires by the Probation Officer and follow the instructions of the Probation Officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the Probation Officer for schooling, training or other acceptable reasons.

6) The defendant shall notify the Probation Officer at least ten days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substance, except as prescribed by a physician.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the Probation Officer.

10) The defendant shall permit a Probation Officer to visit him or her at anytime at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the Probation Officer.

11) The defendant shall notify the Probation Officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the Court.

13) As directed by the Probation Officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the Probation Officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINE

The defendant shall pay a fine of $500.00. This fine includes any costs of incarceration and supervision.

Payment of said fine shall begin immediately. Fine shall be made to Clerk, United States District Court, 655 East Durango Blvd.. San Antonio, TX 78206.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

The defendant shall pay interest on any fine of more than $2,500.00, unless the fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. §3612(f) All payment options may be subject to

penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, 4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

NOT FOR PUBLIC DISCLOSURE

Judgment

Defendant: ARTHUR GUTIERREZ, JR.
Case Number: SA-0l-CR-167-(5)-EP

STATEMENT OF REASONS

The Court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level:	38
Criminal History Category:	I
Imprisonment Range:	235 months to 293 months.
Supervised Release Range:	5 to years
Fine Range:	$ 25,000 to $4,000,000
Restitution:	$ 0

The sentence departs from the guideline range for the following reason(s): The Court departs downward from the guideline sentence because this case significantly differs from the "heartland" cases covered by the guidelines. The Court views the defendant's behavior as aberrant and the utilization of the 15 Kilograms of sham cocaine as an overstatement of the seriousness of the offense. However, the Court believes further departure is not warranted because the defendant was not threatened during the instant offense and the defendant possessed a firearm at the time of the offense conduct.

APPENDIX C

RELEVANT STATUTES

18 U.S.C. §2:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

21 U.S.C. §841(a)(1):

"Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;..."

21 U.S.C. §841(b)(1)(A):

"(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

...

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of–

...

(II) cocaine..."

21 U.S.C. §846. Attempt and conspiracy

"Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

CRIMINAL NO.
SA-01-CR-167 EP

ARTHUR GUTIERREZ, JR. (5),
Defendant.

ORDER

On this date the Court considered Defendant's Motion for An Evidentiary Hearing to Determine the Extent of Exculpatory Evidence No.'s 1 and 2, Motion to Preclude Evidence of Predisposition to Commit the Criminal Acts Alleged in the Conspiracy No. 1 and the Government's Response thereto. After due consideration, and for reasons stated in the Government's Response, it is hereby

ORDERED that the Defendant's motions are hereby DENIED. It is further

ORDERED that said Motions, the Government's Response, and this Order be SEALED.

SIGNED and ENTERED this 28th day of Feb., 2002.

/s/_____
EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
[Filed Oct 01 2003]

No. 02-50668

UNITED STATES OF AMERICA
Plaintiff-Appellee

V.

ARTHUR GUTIERREZ, JR.
Defendant- Appellant

Appeal from the United States District Court for the Western District of Texas, San Antonio

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ON PETITION FOR REHEARING

Before GARWOOD AND HIGGINBOTHAM, Circuit Judges, and FELDMAN, District Judge.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR
THE COURT
/S/ Patrick
Higginbotham

*District Judge of the Eastern District of Louisiana, sitting by designation.

REHG-2